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No. 90-1686

In the Supreme Court of the United States

OCTOBER TERM, 1990

OSVALDO RODRIGUEZ-CARDONA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly admitted evidence of extrinsic criminal conduct.

2. Whether the district court correctly departed upward from the sentencing range indicated by the Sentencing Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-57a) is reported at 924 F.2d 1148.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 1991. The petition for a writ of certiorari was filed on April 22, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted on four counts of possessing cocaine with intent to distribute it, in

violation of 21 U.S.C. 841(a)(1) (Counts 1, 3, 5, and 7), and on four counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1) (Counts 2, 4, 6, and 8). The district court sentenced him to concurrent 20-year terms of imprisonment on Counts 1-4, which were pre-Sentencing Guidelines counts, and to concurrent terms of 175 months' imprisonment on Counts 5-8, which were post-Sentencing Guidelines counts, with the sentences on Counts 5-8 to run consecutively to the sentences on Counts 1-4. The district court also sentenced petitioner to concurrent five-year terms of special parole or supervised release on each count and fined him $200,000. The court of appeals affirmed. Pet. App. 1a-57a.[1]

1. In October 1987, the FBI received information from the Puerto Rico police that petitioner was using his restaurant in Salinas, Puerto Rico, for illegal drug trafficking. Based on that information, the FBI decided to use an informant, Angel Santiago Rodriguez ("Santiago"), to buy drugs from petitioner under FBI surveillance. Santiago had previously cooperated with the FBI during a 1986 investigation into several murders traced to the Martinez Torres gang, of which Santiago was a member. Through an associate in

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[1] In a separate indictment returned the same day as the instant indictment, petitioner was charged with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and with six counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After his conviction in the instant case, petitioner pleaded guilty to the conspiracy count of the separate indictment, and the government agreed to dismissal of the remaining counts. The district court sentenced petitioner to a term of 33 months' imprisonment, to be served consecutively to the sentence imposed in the instant case, and to a five-year period of supervised release, to be served concurrently with the periods of special parole and supervised release imposed in the instant case. The district court also fined petitioner $25,000. Gov't C.A. Br. 2 & n.1. The court of appeals affirmed. Pet. App. 53a-57a.

the Martinez Torres gang, Santiago had become acquainted with petitioner. Gov't C.A. Br. 4-5; Pet. App. 3a.[2]

Petitioner sold cocaine to Santiago on four occasions between October 1, 1987, and March 12, 1988. On each occasion, FBI agents gave Santiago cash, wired him with a recording transmitter, and established surveillance. Santiago then met with petitioner, either at petitioner's restaurant or at his home, and purchased varying amounts of cocaine. After each purchase, the agents retrieved the tape recordings and the cocaine. Both before and after each purchase, the agents searched Santiago, his vehicle, and his companions to ensure that Santiago had no narcotics in his possession other than those purchased from petitioner. Gov't C.A. Br. 3, 5 & n.3; Pet. App. 3a-4a.

After the fourth transaction, FBI agents arrested petitioner and searched his house pursuant to a warrant. They found a triple-beam scale and plastic sandwich bags, items frequently used by drug traffickers. Subsequent chemical analysis revealed cocaine residue on the scale. Gov't C.A. Br. 11; Pet. App. 4a.

2. The evidence introduced by the government at petitioner's trial consisted of the cocaine that petitioner sold to Santiago, the tape recordings of the sales, and the testimony of Santiago and the FBI agents who monitored the sales. Gov't C.A. Br. 3; Pet. App. 4a. Petitioner's claims in this Court focus on a series of incidents that he says denied him a fair trial.

a. FBI Agent Pedro Toledo testified that Santiago came to the FBI's attention during its investigation of the murders in which the Martinez Torres gang was implicated and that Santiago had provided detailed statements about the

[2] Santiago had met petitioner in 1986 through one of Santiago's associates in the Martinez Torres gang. At that meeting, Santiago's associates told petitioner that the Martinez Torres brothers had put out a contract for petitioner's murder. Gov't C.A. Br. 4.

murders. Defense counsel objected to that testimony. The district court overruled the objection but admonished the jury that "in this case the defendant is being tried only on the charges set forth in the indictment and nothing else." Gov't C.A. Br. 16; 1 Tr. 16.

b. Santiago and two FBI agents testified about meetings with petitioner on July 8 and 9, 1988, during which petitioner and Santiago discussed cocaine purchases but no purchases were made. Defense counsel objected that the testimony concerned events beyond the time frame of the indictment, which alleged transactions between October 15, 1987, and March 12, 1988. The district court admitted the testimony, finding that it was probative of intent and that its probative value outweighed any prejudicial effect. Gov't C.A. Br. 17-18.

c. During Santiago's testimony, as a recording of a meeting with petitioner was about to be played, defense counsel objected to remarks on the tape concerning counterfeit money and numbers racketeering. Counsel argued that those remarks did not concern this case. The district court permitted the jury to hear the remarks, noting that they had been made by petitioner and were "part of the whole conversation." At the same time, the court cautioned the jury that petitioner was on trial only for the charges in the indictment. 3 Tr. 15-16, 18; see also Pet. App. 13a; Gov't C.A. Br. 20. The district court gave a similar cautionary instruction after an FBI agent testified that Santiago stated that petitioner had possessed prohibited sea turtle meat. 2 Tr. 9; see also Pet. App. 13a-14a; Gov't C.A. Br. 21 n.9.

d. During Santiago's testimony about an October 22, 1987, meeting with petitioner, the prosecutor asked, "And what happened thereafter, sir?" Defense counsel objected, and the district court overruled the objection. Santiago then testified: "We went there because we had the intention of

recording what he said. Some comments of the District Attorney from Guayama that they had planned to kill." The district court immediately admonished the jury: "I'm leaving in this evidence only for the purpose of why he went there as to the answer just elicited. Consider it why he went there and not the contents of the answer. So you must disregard that. You are to disregard that." Later that day, the court elaborated on its earlier cautionary instruction, telling the jury "that you should disregard, get out of your minds completely that testimony about that threat to a commonwealth district attorney." 3 Tr. 19-20; 51-52; Gov't C.A. Br. 21-22.

e. During his closing argument, the prosecutor observed that Santiago met petitioner through persons who had contracted to have petitioner killed and that the contract was drug-related: "Because of drugs. For drugs. Killings, brutal killings. Drugs." The prosecutor later commented that petitioner's restaurant only appeared to be a legitimate business, "because behind those walls a deadly trade was being conducted, the deadly trade of narcotic trafficking." Gov't C.A. Br. 25; 2/13/89 Excerpt 5-6, 9.

In his closing argument, defense counsel attacked the credibility of Santiago by characterizing him as a confessed participant in 15 murders and a "professional killer at the age of 24 years old." Counsel also urged the jury to reject any suggestion that petitioner's restaurant was a front for drug trafficking. Gov't C.A. Br. 25-26; 2/13/89 Excerpt 16-17, 21-22.

In his rebuttal argument, the prosecutor acknowledged that Santiago was involved in murders but observed that "these murders are not because fish is sold in [petitioner's restaurant], and these murders are not because [the restaurant] is a legal business. These murders * * * are because of this, because of drugs." Because petitioner had a legal business like the restaurant, "[t]here was no need

[to sell drugs]. But what do we have here? We have here greediness, evilness, and we have here drugs." The government, the prosecutor said, needed the Santiagos "of this world to bring forth to you the cocaine that is sold concealed by [petitioner]." The prosecutor asked: "[W]ho was the only one able to make those purchases? A dealer. A drug dealer. A murderer. That is the type of friends of [petitioner]." Defense counsel did not object to any of the prosecutor's statements. Gov't C.A. Br. 26-27; 2/13/89 Excerpt 25-26.

f. In sentencing petitioner on the four Sentencing Guidelines counts, the court found that the 60 grams of cocaine involved established a base offense level of 16. The court determined that, pursuant to Sentencing Guidelines § 3B1.1(a), the offense level should be increased by four points to 20 because petitioner was a leader in the offense.[3] The court found that petitioner's criminal history category was III and the applicable Sentencing Guidelines range was 41-51 months.[4] The court then determined that Category III significantly underrepresented the seriousness of petitioner's criminal history and the likelihood of his recidivism. Gov't C.A. Br. 37; 6/9/89 Tr. 19-20.[5]

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[3] Sentencing Guidelines § 3B1.1(a) directs the sentencing court to increase the offense level by four points "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive."

[4] In determining petitioner's criminal history category, the court took into account that petitioner had previously been convicted of a narcotics violation in Puerto Rico and was on probation at the time of the instant offenses. Gov't C.A. Br. 37 n.18; 6/9/89 Tr. 20. See Sentencing Guidelines § 4A1.1.

[5] The court noted that petitioner's criminal history, which began in 1967, included mainland charges for theft, conspiracy, burglary, and possession and delivery of controlled substances, and 1987 local and 1988 federal convictions in Puerto Rico for narcotics violations. According to the court, petitioner "had a life of narco-trafficking and other violations." Gov't C.A. Br. 37-38; 6/9/89 Tr. 17.

In concluding that petitioner's criminal behavior was significantly more serious than that of other defendants in the same criminal history category, the court found that petitioner had ordered the murder of an adverse witness in a prior state criminal trial, was implicated in the murder of another witness scheduled to testify against petitioner at a probation revocation hearing, and had planned to murder the district attorney who sought to revoke petitioner's probation. The court also found that petitioner had defrauded an insurance company of approximately $37,000; had used a nine- or ten-year-old boy as a messenger in his drug business; was one of the most important drug traffickers in southern Puerto Rico; and had demonstrated a cynical disregard of the legal system, for example, by displaying a "Say No to Drugs" sign outside his restaurant. Pet. App. 26a-28a. The court based those findings on petitioner's recorded statements, the government's sentencing memorandum, and the presentence report. See Pet. App. 30a-31a. The court expressly found that those sources were "reliable." Pet. App. 25a-28a; Gov't C.A. Br. 39; 6/9/89 Tr. 27-29.

Based on its findings, and relying on *United States* v. *Diaz-Villafane*, 874 F.2d 43, 49-52 (1st Cir.), cert. denied, 493 U.S. 862 (1989), the court departed upward from the indicated sentencing range. The court selected the appropriate range for departure by treating petitioner's offense level as if it were 28 and his criminal history category as if it were category VI. The court then sentenced petitioner to concurrent terms of 175 months' imprisonment on each of Counts 5-8, to be followed by concurrent five-year periods of supervised release on each count, and fined petitioner $25,000 on each count. Gov't C.A. Br. 39-40; 6/9/89 Tr. 29-30.

3. The court of appeals affirmed. Pet. App. 1a-57a.

a. The court rejected petitioner's challenge to the lower court's evidentiary rulings under Federal Rule of Evidence

404(b), holding that the challenged rulings were either correct or constituted harmless error. First, the court held that Agent Toledo's testimony about the underlying murder investigation was correctly admitted because the prosecution needed to place damaging information about Santiago before the jury on direct examination. That testimony had no prejudicial impact on petitioner, the court held, because it did not implicate petitioner in the murders and because it was followed by a cautionary instruction. Pet. App. 7a-9a. Second, the court held that, although testimony about events occurring after the transactions charged in the indictment should not have been admitted, the error was harmless in light of the overwhelming evidence against petitioner. *Id.* at 9a-13a. Third, the court held that the admission of references to counterfeit money, numbers racketeering, and prohibited sea turtle meat, even if erroneous, created no risk of prejudice to petitioner. *Id.* at 13a-14a. Finally, the court held that the admission of Santiago's reference to threats against the district attorney in Guayama, although prejudicial, was harmless in light of the overwhelming evidence against petitioner. *Id.* at 14a-17a.

Considering the cumulative effect of the challenged evidence, the court found that "the government came very close to upsetting the conviction for which it fought so hard." Pet. App. 18a. The court emphasized, however, that in light of "the overwhelming nature of [the government's admissible] evidence," reversal was not required. *Ibid.*

b. The court observed that defense counsel did not object at trial to the prosecutor's comments during closing arguments. Pet. App. 21a. It accordingly applied a plain error standard, considering whether any of the prosecutor's comments "undermine[d] the fundamental fairness of the trial and contribute[d] to a miscarriage of justice." *Ibid.* (quoting *United States* v. *Young*, 470 U.S. 1, 16 (1985)). The court held that none of the comments amounted to

plain error in light of the strength of the government's case. Pet. App. 20a-23a.

c. The court upheld petitioner's sentence. It rejected petitioner's argument that the sentence was based on unreliable and uncorroborated information. Pet. App. 29a-31a. In the court's view, the district court properly relied on petitioner's recorded statements, the government's sentencing memorandum, and the presentence report. *Id.* at 30a-31a. The court of appeals further held that petitioner's offense level was correctly increased pursuant to Sentencing Guidelines § 3B1.1(a) because petitioner was a leader in a criminal activity involving five or more persons. Pet. App. 32a. The presentence report, the court noted, "specifically identified at least four other participants" in addition to petitioner. *Ibid.*

The court also upheld the district court's upward departure in sentencing, applying the analysis set forth in its decision in *United States* v. *Diaz-Villafane*, 874 F.2d at 49. The court held, first, that the factors on which the district court relied were "sufficiently unusual to justify a departure." Pet. App. 34a. The court observed that in prior decisions several of those factors—*i.e.*, "[petitioner's] importance as a drug supplier, his use of a minor in his business, [and] the amount of money involved in that business"—had been held to be proper grounds for departure. *Ibid.* Next, the court held that "the information on which the [district court] based [its] decision to depart was appropriate and reliable." *Id.* at 36a. Finally, the court held that the degree of departure was reasonable. *Id.* at 37a. The court observed that "[t]he sentencing court took great pain in setting forth the reasons underlying its decision to depart. These reasons paint a portrait of [petitioner] as a lifetime criminal offender, one who has shown no respect whatsoever for the law or any other social institutions." *Ibid.* The court rejected petitioner's argument that in departing upward the district court was

required to "proceed sequentially through the [criminal history] categories, considering each, until arriving at the one bearing the most resemblance to the defendant's situation." *Id.* at 38a. The court observed that "[t]he [G]uidelines themselves do not require a category-by-category evaluation." *Id.* at 39a. Moreover, the court reasoned that the cases imposing such a requirement, *e.g.*, *United States* v. *Coe*, 891 F.2d 405, 412-413 (2d Cir. 1989), and *United States* v. *Anderson*, 886 F.2d 215, 216 (8th Cir. 1989), are distinguishable because they concerned departures based solely on past criminal conduct. In contrast, "the departure in this case was not based solely on [petitioner's] past criminal conduct, but on a myriad of aggravating circumstances." *Id.* at 40a.

ARGUMENT

1. Petitioner renews his challenge to the district court's admission of evidence of criminal conduct other than that charged in the indictment. The court of appeals was correct in concluding that some of the challenged evidence was properly admitted and that any error in the admission of other evidence was harmless.

The court of appeals properly upheld the admission of Agent Toledo's testimony about Santiago's participation in several murders. As the court of appeals recognized, that testimony "plainly served a purpose other than solely to demonstrate [petitioner's] criminal propensity." Pet. App. 8a. By eliciting the damaging testimony about Santiago during its case, the government legitimately sought to blunt the impact of petitioner's inevitable cross-examination. See, *e.g.*, *United States* v. *Del Purgatorio*, 411 F.2d 84, 87 (2d Cir. 1969). Moreover, the testimony had no prejudicial effect, because it did not implicate petitioner in the murders; it concerned only Santiago. Finally, the judge gave a cautionary instruction that ensured against any prejudicial effect.

The court of appeals was also correct in holding that references at trial to counterfeit money, numbers racketeering, and illegal sea turtle meat caused no prejudice to petitioner, and that any possible prejudice was cured by the district court's cautionary instruction. "[T]he possibly prejudicial effect of evidence can require exclusion only in those instances where the trial judge believes that there is a genuine risk that the emotions of the jury will be excited to irrational behavior, and that this risk is disproportionate to the probative value of the offered evidence." *United States* v. *Dornhofer*, 859 F.2d 1195, 1199 (4th Cir. 1988), cert. denied, 490 U.S. 1005 (1989) (citations omitted). As the court of appeals stated, there was "no genuine risk" that the jury would react irrationally to the testimony in this case to numbers racketeering, counterfeiting, and possessing a prohibited product. Pet. App. 14a.

The court of appeals correctly held that any error in the admission of evidence about events occurring after the transactions charged in the indictment and about threats against the district attorney in Guayama was harmless. The evidence of petitioner's guilt was, as the court of appeals recognized, "overwhelming." Pet. App. 12a, 18a. That evidence included the recordings of petitioner's voice during four cocaine sales, the cocaine that he sold on those four occasions, and testimony by the purchaser of the cocaine as well as by the FBI agents who witnessed the transactions. In light of this evidence, the jury's verdict could not have been influenced by the evidence that petitioner challenges.

For similar reasons, the court of appeals correctly held that the prosecutor's comments during closing argument did not constitute plain error. The court properly inquired "whether the closing argument affected the outcome of the case." Pet. App. 22a. See, *e.g.*, *United States* v. *Rodriguez-Estrada*, 877 F.2d 153, 159 (1st Cir. 1989). The court recognized that such comments must be considered "not in

sterile isolation, but within the framework and context of the actual trial." *Ibid.*; see *United States* v. *Young*, 470 U.S. 1, 16 (1985). Where the evidence of guilt presented by the government is overwhelming, even ill-advised oratory by the prosecutor is unlikely to have any prejudicial effect. See *United States* v. *Young*, 470 U.S. at 16; *United States* v. *Doe*, 860 F.2d 488, 495 (1st Cir. 1988), cert. denied, 490 U.S. 1049 (1989). As the court of appeals concluded, viewed under those principles, the prosecutor's comments in this case were not plain error. Pet. App. 23a.

It was proper for the prosecutor, in marshalling the evidence for the jury, to comment on the evidence in the record linking drugs with violence.[6] It was likewise within the appropriate limits of closing argument for him to refer to the "deadly trade of narcotic trafficking" (Pet. App. 20a). See, *e.g.*, *United States* v. *Musser*, 856 F.2d 1484, 1485-1486 (11th Cir. 1988) (prosecutor's reference to drug dealing as a "dirty, nasty, deadly business" well within bounds of proper closing argument), cert. denied, 489 U.S. 1022 (1989). And it was proper for the prosecutor to respond in his rebuttal argument to defense counsel's attack on Santiago and to counsel's characterization of petitioner's restaurant as a legal business. See *United States* v. *Brack*, 747 F.2d 1142, 1152 (7th Cir. 1984), cert. denied, 469 U.S. 1216 (1985). In any event, petitioner did not object to the prosecutor's remarks at trial, and any error during closing argument was not so grievously prejudicial as to result in a miscarriage of justice of the sort required to establish plain error. See *United States* v. *Young*, 470 U.S. at 11-14.

In sum, this case does not present "a systemic abuse of defendant's rights" (Pet. 20) requiring this Court's correc-

[6] See, *e.g.*, 3 Tr. 82-88, where on cross-examination defense counsel led Santiago through a detailed recital of the drug-related murders in which he participated.

tion. The district court's "conscientious effort to control any damage flowing from potentially unfairly prejudicial testimony" (Pet. App. 19a) and the court of appeals' thorough review of petitioner's conviction ensured that petitioner's trial was fair, and that any error that may have occurred during the trial did not affect petitioner's substantial rights. See Fed. R. Crim. P. 52(a); 28 U.S.C. 2111 (federal appellate courts should "give judgment * * * without regard to errors or defects which do not affect substantial rights of the parties"); see also *Bruton* v. *United States*, 391 U.S. 123, 135 (1968) ("A defendant is entitled to a fair trial, but not a perfect one," quoting *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953)).

2. Petitioner further contends (Pet. 20-30) that the district court erred in departing upward from his criminal history category under Sentencing Guidelines § 4A1.3 and in adjusting his base offense level upward under Sentencing Guidelines § 3B1.1(a). The court of appeals properly rejected those contentions.

a. Petitioner argues (Pet. 22-23) that, in departing upward from his criminal history category, the district court was required to move sequentially, asking whether each higher category adequately reflected petitioner's past conduct, and moving to the next higher category only after answering that question in the negative. The Sentencing Guidelines require no such mechanistic procedure. Instead, Guidelines § 4A1.3 directs the court to "use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable." The district court complied with that directive here. The court found category VI to be the criminal history category that most accurately reflected petitioner's criminal background and propensities,

and the court therefore sentenced petitioner as if his criminal history category were VI. The Guidelines require no more.[7]

Contrary to petitioner's contentions (Pet. 23, 25), the district court did not "unaccountably" arrive at a higher criminal history category, nor was the degree of the departure "wholly unreasonable." As the court of appeals stated, the district court "took great pain in setting forth the reasons underlying its decision to depart." Pet. App. 37a. Those reasons included petitioner's implication in the commission of two murders and in the planning of a third murder, his insurance fraud, his use of a minor in his drug business, his importance as a drug trafficker in Puerto Rico, and his disregard for the criminal justice system, as evidenced by his commission of offenses while on probation and by the hypocrisy of his posture as a successful businessman urging others to "Say No to Drugs." Pet. App. 17a, 20a-29a. In these circumstances, it was reasonable for the court to depart to the extent that it did in this case. See *Diaz-*

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[7] As the court of appeals observed (Pet. App. 40a), the district court's departure was not based solely on petitioner's past criminal conduct, but on a "myriad of other aggravating circumstances." That fact distinguishes the departure in this case from those involved in cases holding that a sentencing court must move sequentially through criminal history categories, *e.g.*, *United States* v. *Jones*, 905 F.2d 867, 870 (5th Cir. 1990); *United States* v. *Coe*, 891 F.2d 405, 412-413 (2d Cir. 1989); *United States* v. *Anderson*, 886 F.2d 215, 216 (8th Cir. 1989). The "tension" or "inconsistency" acknowledged by the court of appeals in *Jones*, 905 F.2d at 869, and noted by petitioner (Pet. 24) concerns the reasonableness of the extent of departures, not the sequential movement through criminal history categories. Compare *United States* v. *Lopez*, 871 F.2d 513 (5th Cir. 1989) (vacating sentence 2.4 times greater than guideline maximum) with *United States* v. *Harvey*, 897 F.2d 1300 (5th Cir.) (upholding sentence 2.5 times greater than guideline maximum), cert. denied, 111 S. Ct. 568 (1990). In any event, any such "tension" exists wholly within the Fifth Circuit, and is appropriately resolved by that court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

Villafane, 874 F.2d at 50-51; see also *United States* v. *Gardner*, 905 F.2d 1432, 1437 (10th Cir.), cert. denied, 111 S. Ct. 202 (1990); *United States* v. *Franklin*, 902 F.2d 501, 507-508 (7th Cir.), cert. denied, 111 S. Ct. 274 (1990); *United States* v. *Anders*, 899 F.2d 570, 579 (6th Cir.), cert. denied, 111 S. Ct. 532 (1990).[8]

b. There is no merit to petitioner's contention (Pet. 26-30) that the district court erred when it increased his offense level under Sentencing Guidelines § 3B1.1(a) based on his leadership in a criminal activity that involved five or more participants or was "otherwise extensive."

At the outset, petitioner is mistaken when he asserts (Pet. 26-27) that there was no evidence to support the adjustment of his offense level. As the court of appeals noted (Pet. App. 32a), the presentence report identified at least four other participants in his drug trafficking activities, namely, his three co-conspirators in a companion case (see note 1, *supra*) and a minor whom petitioner used as a messenger in his drug trafficking business. Since petitioner did not object to the presentence report in this respect, the district court properly relied on it. See Fed. R. Crim. P. 32(c)(3)(D); *United States* v. *Fox*, 889 F.2d 357, 359 (1st Cir. 1989). Moreover, other evidence—for example, petitioner's own recorded statements portraying himself as a drug kingpin—justified enhancement of his offense level based on leadership in criminal activity that was "otherwise extensive" (Guidelines § 3B1.1(a)).

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[8] Petitioner's reliance (Pet. 26) on *United States* v. *Schmude*, 901 F.2d 555, 559-560 (7th Cir. 1990), is misplaced. There, the magnitude of an upward departure was held unreasonable because the defendant was sentenced to more than double the maximum guideline range when only one factor, the repeat nature of the offense, warranted departure. In the present case, as the court of appeals noted (Pet. App. 40a), a "myriad of * * * aggravating circumstances" justified the departure.

Petitioner is also mistaken in asserting (Pet. 28) that, in increasing petitioner's base offense level under Guidelines § 3B1.1(a), the district court could not consider his direction of co-conspirators in a different case involving subsequent events. Guidelines § 1B1.3(a)(2) directs sentencing courts in determining the offense level to consider "all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction," when the offense of conviction is subject to grouping under Guidelines § 3D1.2(d). The drug trafficking offenses of which petitioner was convicted are subject to grouping under Guidelines § 3D1.2(d). See Guidelines § 2D1.1. Thus, the district court was entitled to consider the conspiracy that petitioner directed, because it was part of the same course of conduct as the drug trafficking offenses of which he was convicted.[9]

Petitioner next asserts (Pet. 29a-30a) that the court of appeals had no basis for concluding that the minor used by petitioner as a messenger in his drug trafficking business and identified as such in the presentence report was criminally culpable. Petitioner did not raise this point in the court of appeals, and he therefore cannot pursue it now. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event, in the absence of objection by petitioner (see Fed. R. Crim. P. 32(c)(3)(D)), the district court was entitled to conclude from the presentence report's description of the minor's activities that the minor was criminally culpable. See *United States* v. *Fox*, 889 F.2d at 359; see also 18 U.S.C. 5031 (defining "juvenile" as person who has not yet reached eighteenth birthday and "juvenile delinquency" as a violation

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[9] The court was also entitled to rely on the presentence report for information regarding that conspiracy, since, as noted, petitioner did not object to the report in this respect. See *United States* v. *Fox*, 889 F.2d at 359; Fed. R. Crim. P. 32(c)(3)(D).

of law committed by such a person that would have been a crime if committed by adult).[10]

There is no merit to petitioner's final contention (Pet. 30) that the district court "may" have based the sentence on "unreliable, uncorroborated hearsay." As explained above, the district court relied on petitioner's own recorded statements, the government's sentencing memorandum, and the presentence report. See Pet. App. 30a. As the court of appeals observed (*ibid.*), petitioner challenged the presentence report only on the ground that it did not recognize his alleged acceptance of responsibility, and the sentencing memorandum "was based on official sources (the recordings played at trial, witness interviews, and statements by FBI agents, Puerto Rico police officers, and confidential sources)." Petitioner provides no reason for setting aside the lower courts' conclusions that those sources were reliable. Pet. App. 31a; see also Guidelines § 4A1.3.[11]

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[10] Because the presentence report made clear that the minor used as a drug messenger was criminally culpable, cases involving "unknowing outsiders," *e.g.*, *United States* v. *DeCicco*, 899 F.2d 1531, 1535-1537 (7th Cir. 1990), and *United States* v. *Anderson*, 895 F.2d 641, 645-646, reh'g granted, 911 F.2d 380 (9th Cir. 1990); see also *United States* v. *Carroll*, 893 F.2d 1502, 1509 (6th Cir. 1990) (involving supervision of a government agent), are plainly inapposite.

[11] Petitioner's reliance (Pet. 30) on *United States* v. *Missick*, 875 F.2d 1294, 1301-1302 (7th Cir. 1989), is misplaced. The departure found improper in *Missick* was based on the possession of firearms by persons to whom the defendant sold drugs. In the present case, the adjustment in petitioner's offense level was based on his own course of drug trafficking conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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